Supreme Court, U.S.
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NO.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WALLACE WARD,
DEFENDANT-PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE #1

The District Court Judge's comments to the jury prior to his reading of an imperfectly formulated jury instruction due to its size, unfairly prejudiced the jury against Petitioner Ward and nullified the impact of the United States Supreme Court Case Law as to the specific intent necessary to violate 26 U.S.C. 7201 and 26 U.S.C. 7203.

ISSUE #2

The United States Attorney failed to allow discovery of exculpatory evidence which includes inspection of seized business records including computer discs and backup discs as required by the Petitioner Pro Se in violation of Rule 16(a)(1)(A) F.R.Cr.P. and a denial to Petitioner of his First, Fifth, and Sixth Constitutional rights.

ISSUE #3

The United States Attorney's office failed to establish a Prima Facie Case and the district court erred when it failed to grant Petitioner Ward's Motion to dismiss and Petitioner Ward moves the Court of Appeals to review the decision of the jury based on plain error, abuse of discretion by the district court, and to prevent a manifest miscarriage of justice, and if F.R.Cr.P Rule 29(a) and 29(b) are constitutionally vague as written denying Petitioner Ward of due process of law.

ISSUE #4

Judicial, Prosecutorial, and Juror misconduct denied Petitioner Ward of his Fifth Amendment Constitutional right to due process of law and his Sixth Amendment right to trial by an impartial jury.

ISSUE #5

The District Court Judge erred when he increased Petitioner Ward's sentence to five years and added additional conditions without a showing of changed circumstances on a pre-guideline case.

PARTIES TO THE PROCEEDING

In addition to the parties named in the style of this case there are no other parties known to Petitioner at this time.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ward respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on September 26, 1994.

REFERENCE TO OPINIONS IN THE CASE

The judgment and opinion of the Ninth Circuit Court of Appeals is United States of America v. Wallace Ward, 93-10703,(9th Cir. Sept. 26, 1994) appendix a pg. 11a. The ordered of the District Court, Jury Verdict Case # CR-S-90-057 LDG (LRL).

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. §125 and Supreme Court Rule 10.

STATEMENT OF THE CASE WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

1. Jurisdiction in the District Court

The United States exercised jurisdiction by virtue of a six count indictment charging the Defendant with a violation of 26 U.S.C. sec 7201 attempt to evade or defeat income tax; 26 U.S.C. sec 7203 failure to file.

2. Appealable Order

Appellant Ward was found guilty by a jury August 4, 1993 of violating three counts of 26 U.S.C. Sec 7201 and of violating three counts of 26 U.S.C. Sec 7201.

3. Notice of Appeal

Appellant Ward Pro Se filed timely notice of appeal November 15, 1993.

4. Bail Status

Appellant Ward is on probation.

RREASON TO GRANT WRIT

A vast departure by the various Circuits and District Courts from the decision of Cheek v. United States, 111 S. Ct. 604, 610, 611 (1991), constitutes a denial of due process of law. Many jurisdictions follow the above cited case, however jurisdictions primarily United States District Courts are interposing their indirect objection to the "Cheek" decision as was true in the instant case. This is an important case with an outstanding judicial history, but it requires the Supreme Court's power of supervision, so as to maintain the integrity and uniformity of its decision.

Judicial acts of prejudice and vindictiveness as well as the District Court's failure to inquire as to jury and prosecutorial misconduct denied Ward his Fifth and Sixth Amendment Constitutional rights.

STATEMENT OF THE CASE

The current status of this case belies the long history and evolving importance of this case to the United States which led to this petition for a writ of certiorari. The primary motivating factor in this case by the Government against Petitioner is political. Ward is a published writer not only in the domestic arena, but also the international arena. Most, if not all, elected politicians and Government officials routinely receive his pro bono writings. Some of Petitioner's writings are controversial and he is widely known as a political activist. It is undisputed by the government that Ward was politically active prior to November 3, 1986. However, the long legal history of this prosecution began November 3, 1986 with a search and total seizure of his writings, manuscripts, equipment and publishing

business. Petitioner's actual arrest did not occur until March 26, 1990, well over three years later. And, the arrest only occurred as a result of Ward exercising his Constitutional Right to First Amendment protection.

The general sequence of facts in this case are really not in dispute except as to the perspective of the Petitioner as opposed to that of the Government. The conviction and dedication of Ward to the scientific study of society, government and politics are all inclusive in his perspective. This is opposed by the establishment perspective of the Government and its questionable motivations.

Prior to the formal prosecution, Ward was developing two very important theories. Originating back to the late 70's, Ward was developing the Research Institute For Biological Immorality as

well as the "Golden Helmet". The Research Institute For Biological Immorality was also known as R.I.B.I.. The bookkeeper for the Research Institute For Biological Immorality was the paid Government informant, Linde Gold. She was making the bank deposits, writing checks, completing the reports and maintaining the bookkeeping.

The Research Institute For Biological Immorality was receiving donations to fund international research as the F.D.A. regulations restricted research in the United States relating to the extension to human life expectancy. The entire contributed funds to the Research Institute For Biological Immorality were seized along with manuscripts, work in process and research data. Because of the actions of the Government all Petitioner's life extension research was permanently destroyed. The qualifications of Dr.

Ward in this research area is well documented. (See Government's Appeal Brief page 4 and 5.

> "In 1957, the defendant earned a doctorate degree (Ph.D.) in inorganic and analytical chemistry from the University of Iowa and went to work for E.I. du Pont de Nemours company (Dupont). [RT 8/3/93 at 84] In 1973, the defendant resigned his position as a senior research chemist at Dupont ' "to pursue full-time the cure of man kind's [sic] worse [sic] plague -- the death and destruction disease of irrationality".' [RT 8/3/93 at 88] from 1973 to 1976, the defendant wrote and produced a quarter-million word encyclopedia about the disease of irrationality and its cure. [RT 8/3/93 at 88]."

Approximately 1980, Petitioner initiated the development of his "Golden Helmet" theory relating to the payment of taxes to support the Government. In the early 1980's, the rapidly expanding domestic activity in the United States required increased tax revenues. The increased tax revenue required was beginning to restrict business growth. It is a well accepted business principal that

increased tax expense to any business restricts growth. This is demonstrated by the general reluctance of congress to increase the tax rate on corporations, because any tax increase directly restricts capital growth and employment. History demonstrates that a successful business will actually generate greater tax revenues for the Government as well as serve as the common good with increased employment and an improved wage base. During the period 1980 – 1986 pre-prosecution years of Petitioner – President Ronald Regan was elected president. During this period, business taxes remained stable and business was allowed to grow. President Regan was also developing a similar economic theory to that of Petitioner which was known as "trickle down economics". Both the "Golden Helmet" and "trickle down economics" were new and requiring

refinements. Yet, President Regan's presidency brought more widespread prosperity than any other era in American history.

Tax revenue containment fell into disfavor following the end of President Regan's term and property and individual income declined until 1994 when the American people voted for change. Changes to the present income taxing methods are being advocated by House Ways-And-Means Chairman Bill Archer and Congressman Richard K. Armey. Another sign of the times is that the business incubation theory of business development is increasing in popularity throughout the United States. This is but another part of the "Golden Helmet" theory that Petitioner Ward started developing in the early 1980's.

November 3, 1986 the Writing and I & O Publishing Co. offices of Wallace

Ward were raided by the IRS. The raid was carefully planned to have the intended obvious effect of closing down his writing and publishing company to silence the political writings of Ward. The entire criminal case against Petitioner demonstrates a political prejudice towards him, his writings. and his company.

The IRS did nothing with the seized items for more than three years, i.e. 11/3/1986 to 3/29/1990. In January, 1990 Ward put up a huge (16' x 48') electronically lighted billboard across from the location of the Internal Revenue Service the last billboard erected at 8:00 AM on March 29, 1990 read as follows;

"Working as an undocumented alien?
Not cooperating with the IRS?
Doing inside trading?
DON'T WORRY!
* * *
When Neo-Tech Bantam Companies go public everyone worldwide will dump the Professional Value Destroyers"

On the same morning, two newsracks with pamphlets documenting specific illegal behavior by specific IRS employee's were placed in front of two IRS locations. On the same evening that the above billboard and newsracks publicly appeared, the Petitioner was arrested on March 29, 1990. This arrest was based on a one-witness grand jury proceeding rushed through also on that same day of March 29, 1990.

During the physical arrest of Petitioner the evening of March 29, 1990 armed agents were screaming obscenities. An agent threw a stack of Petitioner Ward's publications at him – publications they had removed that morning from the newsstand described above and shouted "How is Neo-Tech going to help you now?". History does repeat itself 2000 years later.

Petitioner represented himself at the arraignment and plea on April 6, 1990. Petitioner continues to represent himself throughout the original trial, successful appeal, his retrial and this his current appeal.

July 9, 1990 Ward filed a motion to challenge the truth oath as presently required of witnesses who testify in court. Ward opposed the traditional oath as given in court as he has a strong conviction that it fails to provide all the relevant evidence for the jury to make an informed decision. Petitioner was denied his right to testify by the court because of his demand to use the Honesty Oath based on fully integrated honesty. The United States Court of Appeals For The Ninth Circuit supported Petitioner's right to use the Honesty Oath and reversed the conviction of Petitioner Ward on April 1,

1993 based on the fact that the "District Court clearly abused its discretion".

The U.S. Attorney's office has made discovery of evidence beneficial to Ward so difficult as to be impossible. This is demonstrated by the actions and roadblocks both the U.S.Attorney's office and the IRS have utilized to prevent effective discovery by Petitioner. These actions and roadblocks were present at both the original trial and the retrial of Petitioner Ward.

Then the U.S. Attorney's office intentionally misled the jury when in the opening statement they stated to the jury at the retrial the following:

> "Neither the Defendant nor I & O Publishing Company maintains the normal sort of books and records from which one could compute what either Mr. Ward's income was or the company's income was. Therefore we've had to establish those facts by other means." (See transcript 1-8).

Petitioner has set out in detail the facts surrounding the denial of his right

to discovery on page 35 Ward was denied discovery at both his first trial; as well as his retrial. Ward needed only minimal discovery from his computer discs or even the backup computer discs which was required to be provided by the U.S.Attorney by virtue of the F.R.Cr., Rule 16(a)(1)(A) and 16(d)(2). All the U.S. Attorney's office and the IRS did was to cherry-pick selected records to mislead the jury.

Ward has had and still has a serious concern that the IRS or the U.S. Attorney's office has destroyed some or all of the evidence which he needs to refute figures presented by the U.S. Attorney.

At the retrial the U.S.Attorney's office attempted to make it appear as if they were trying to be cooperative and allow discovery. An example of the U.S.Attorney's office cooperation was

demonstrated when representatives went to inspect the seized assets and attempted an inventory. The representatives of Ward were escorted into a room with three armed agents. Ward's representatives were shown the assets, however they were not allowed to inventory the seized assets. The inspection was limited to two hours, which made it physically impossible to do any thing resembling an accounting. Both representatives of Ward were of the opinion that some of the seized assets were missing from the inspection site at the time of their inspection.

The U.S. Attorney's office knew that if Ward would have adequate time to inspect and reconstruct the actual accounting and business records on the computer discs or the backup computer discs Ward would have been able to refute the IRS's case against him and I & O Publishing Co.

A careful examination of the transcripts and pleadings at both Petitioner's first and second trial would reveal a definite prejudice against Ward. This prejudice toward Ward is further demonstrated by Judge George's illegal increase to Petitioner's subsequent sentencing.

That portion of the increased sentence relating to mental health counseling was remanded by the Court of Appeals based on the "presumption of vindictive motivation" by Judge George. Judge George also increased the term of Ward's probation from four years to five years (which also is contrary to the presentence report which recommended only a thirty-month term of probation). The District Court Judge did not show any basis for increasing Ward's term of probation. Nor, is there any showing by the government of a changed circumstance

in Ward's record of incarceration and previous probation that would justify or give rise to the additional condition of mental-health counseling.

Petitioner is appealing the conviction from his retrial which began on August 2, 1993 and ended August 4, 1993. Petitioner's appeal to the Circuit Court of Appeals was denied September 26, 1994 and his motion for a rehearing was denied October 21, 1994. Ward has filed a motion for a rehearing En banc, but as of February 16, 1995 he has not received a ruling. Petitioner is currently serving probation as to counts 1-3 after having served a 10 month prison term as to counts 4-6.

Wallace Ward is a 62 year old male who presently resides with his wife Rosa Maria Ward at 1309 Ramona, Boulder City, Nevada. Dr. Ward is a professional scientist and a widely circulated

published writer, author, and publisher of political, scientific, controversial and philosophical books and articles. He will continue with his political activism.

ISSUE #1

The District Court Judge's comments to the jury prior to his reading of an imperfectly formulated jury instruction due to its size, unfairly prejudiced the jury against petitioner Ward and nullified the impact of the United States Supreme Court case law as to the specific intent necessary to violate 26 U.S.C. 7201 AND 26 U.S.C. 7203.

It is not only what words were used, but how the words were said that can influence the outcome of an event. A simple analogy will demonstrate how speakers can inspire and fire-up an audience while another speaker using the same words can bore an audience. The same analogy is true of a District Court Judge. A jury can be persuaded by the actions of a District Court Judge. A District Court Judge, for an example, can lead the jury into a rendering a particular verdict. A District Court Judge can accomplish this by the inflection of his voice, his

comments to the jury, the way he interacts with either side of the litigants and his mannerism. This a District Court Judge can do if he is prejudiced against a particular litigant, such as Judge Lloyd D. George was toward Petitioner Ward. This is exactly what occurred in Ward's criminal retrial.

Judge George imperfectly formulated the suggested "Cheek" instruction and buried it in a rather long, involved instruction relating to the element of willfulness. The construction of the instruction which included willfulness was cleverly crafted by Judge George. The relevant instructions follow:

> [INSTRUCTION NO. 13]
>
> "To establish the crime of income tax evasion as charged in the indictment, the Prosecution must prove beyond a reasonable doubt that defendant willfully attempted to evade or defeat a tax due the Government. This involves the specific intent to evade the tax and some willful commission or affirmative action by defendant in furtherance of that intent.

Willfulness in the context of criminal tax cases is defined as a voluntary, intentional violation of a known legal duty.

By way of illustration only, a willful attempt may be inferred from a consistent pattern of understatement of income, or from some such conduct as destruction or falsification of books and records, the maintenance of a double set of books, the handling of financial affairs in a manner so as to avoid making the usual records, the concealment of assets or sources of income or from any other conduct which would be likely to mislead or to conceal."

[INSTRUCTION NO. 14]

"To find the defendant guilty of violating Section 7201, you must not only find that he did the acts complained of and of which he stands charged, but you must also find that the acts were done willfully by him.

The word 'willfully,' as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, an act or a failure to act is 'willfully' done if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; this is to say, with a purpose either to disobey or to disregard the law.

A defendant's conduct is not 'willful' if he acted through negligence, inadvertence, justifiable excuse or mistake, or due to a good faith misunderstanding of the requirements of the law. A good-faith

belief is one which is honestly and genuinely held.

In this connection, it is for you to decide whether the defendant acted in good faith -- that is, whether he sincerely misunderstood the requirements of the law -- or whether the defendant knew he had a duty under the tax laws and did not comply with that duty. This issue of intent, as to whether the defendant willfully evaded or defeated or attempted to evade or defeat a tax or the payment of a tax is which you must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

You may consider the reasonableness of a defendant's asserted beliefs in determining whether the belief was honestly or genuinely held. In considering a defendant's asserted good-faith misunderstanding of law, you must make your decision based upon what the defendant actually believed and not upon which you or someone else believe or think the defendant ought to believe. If you find that a defendant's beliefs were held in good faith, you may not find the defendant guilty simply because you think the beliefs were unreasonable. The test is whether the defendant himself believed in good faith that he did not have a duty under the tax laws to file returns and pay taxes.

It should be pointed out, however, that a defendant's disagreement with the law or a belief in the unconstitutionality of the law -- no

matter how earnestly held -- does not constitute a defense of good-faith misunderstanding of the requirements of the law, because it's the duty of all citizens to obey the tax laws whether or not they agree with such laws."

It is particularly noteworthy that a portion of the instruction that follows the section which Petitioner Ward refers to as "Cheek Instruction" relating to willfulness is followed by a contradictory section which in effect nullifies the "Cheek Instruction." as herein after set out:

> "You may consider the reasonableness of a defendant's asserted beliefs in determining whether the belief was honestly or genuinely held. In considering a defendant's asserted good-faith misunderstanding of law, you must make your decision based upon what the defendant actually believed and not upon which you or someone else believe or think the defendant ought to believe. If you find that a defendant's beliefs were held in good faith, you may not find the defendant guilty simply because you think the beliefs were unreasonable. The test is whether the defendant himself believed in good faith that he did not have a duty under the tax laws to file returns and pay taxes".

Likewise, this particular portion of the instruction was subsequently stated to the jury as is hereafter set out:

> "It should be pointed out, however, that a defendant's disagreement with the law or a belief in the unconstitutionality of the law.-- no matter how earnestly held -- does not constitute a defense of good-faith misunderstanding of the requirements of the law, because it's the duty of all citizens to obey the tax laws whether or not they agree with such laws."

Compare the two paragraphs from "INSTRUCTION 14" above and it is clear that Judge George cleverly crafted the later paragraph of "INSTRUCTION 14" to nullify the impact of the "Cheek" portion of the "INSTRUCTION 14" as shown in the above paragraph.

This is further dramatized when Judge George (see Transcript III-35) stated to the jury the following comments as shown in the paragraph below:

> "My function, as I've told you before, deals primarily with the law and instructing you as to the law.

Your function, again, is the factual determination.

But there are others who participate in this process. Congress has participated in the process. Congress has passed laws and we deal with those laws.

Now, while you have a great deal of authority, you're not a super-Congress. And if we don't agree with the laws, we can address our congressional people, and that brings about changes.

But your obligation is to accept the law as it has been provided to you, and you cannot neglect to recognize that certain laws have been established by the Congress, and we're obligated to accept that law as Congress has given it to us.

We can, in other settings, address those kinds of problems; and over the many years there have been some significant changes because of conscientious citizens.

But your function as a juror is one that has these parameters that I've mentioned, and you will more fully complete your obligation as a juror if you recognize those limitations and what your function is."

Compare the above comments by Judge George to the jury with the last paragraph of INSTRUCTION 14:

> "It should be pointed out, however, that a defendant's disagreement with the law or a belief in the unconstitutionality of the law.-- no matter how earnestly held -- does not constitute a defense of good-faith misunderstanding of the requirements of the law, because it's the duty of all citizens to obey the tax laws whether or not they agree with such laws."

and it will demonstrate that Judge George is reinforcing the above paragraph of "INSTRUCTION 14". This has the effect of nullifying the impact of the paragraph dealing with that portion of "INSTRUCTION 14" which defines the standard as to the element of willful intent in which the "Cheek's instruction" is to be utilized. This is a clear example of Judge George leading the jury. The intention of Judge George is to weaken or nullify the effect of the "Cheek INSTRUCTION". This has the effect of denying Ward his constitutional protected right of due process of law.

District Court Judge George made his statements to the jury in a powerful and

emotional manner intended to also influence the jury against Ward. Judge George by his statements and his fervor prior to the reading of the instructions gave the impression to the jury that they were to rule strictly according to face value of 26 U.S.C. 7201` and 26 U.S.C. 7203 and not try to ascertain if there was a good-faith belief by Ward. Judge George failed to explain that the jury instructions as read to them were a part of the law which the jury must support. Judge George failed to point out to the jury that a good-faith belief also included the fact Ward could be found not guilty. This good-faith belief would nullify the requisite mens rea of willfulness as provided in Cheek v. United States, 111 S. Ct. 604, 610, 611(1991). Ward did have a valid and reasonable good-faith belief that he was not required to file tax returns. The Petitioner has

repeatedly stated that he has paid all taxes due through his Golden-Helmet, wide-scope accounting method and explained the Golden Helmet, wide-scope accounting method to the jury.

The Petitioner does accept the standard for the statutory willfulness requirement as follows:

> "voluntary, intentional, violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed 12(1976). "Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should be a criminal by his mere failure to measure up to the prescribed standard of conduct."

United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed 381(1933). In United States v. Murdock, (cited infra), the Petitioner was entitled to a separate instruction to the Jury regarding his good-faith belief. The jury instructions should have been designed as set out and

established in Cheek v. United States, 111 S. Ct. 604, (1991) as follows:

> "a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable."

The plain view error of the District Court became evident when Judge George would not allow a separate instruction regarding the good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. "Cheek v. United States, 111 S.Ct.604,(1991).See Petitioner's proposed instructions. (Excerpts of Record Exhibit #6)

> "You have heard the testimony that the Defendant does not believe he personally had income and it was not necessary to file a tax return. It is for you to decide whether the Defendant had a misunderstanding and belief that he is not violating the law or believes that the duty does not exist irrespective if the claimed

> belief or misunderstanding is objectively reasonable.
>
> The jury may consider the reasonableness of defendant's interpretation of law in weighing credibility of claim that defendant's objectively believed that the law did not require that he file returns."

See also United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986).

> "The district court's jury instructions are reviewed for abuse of discretion. This Court examines '"whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations."' United States v. Kessi, 868 F.2d 1097, 1101 (9th Cir. 1989)."

"This Court reviews for plain error when there was not a proper objection in the district court. United States v. Kessi, supra, at 1102; United States v. Ramos, 861 F.2d 228, 230 (9th Cir. 1988).

The proposed instruction by Ward was the definition of willfulness in model jury instructions approved in Cheek as further stated Richey v. United States

Internal Revenue Service, 9 F. 3d 1407, 1411 (9th Cir. 1993) as follows:

> "A reading of the Cheek opinion reveals that it was based on settled principles. Moreover, no assertion has been made that this circuit has ever applied a rule contrary to Cheek. See United States v. Sehjnal, 930 F.2d 1420, 1427 (9th Cir.) cert denied. ---U.S.--- (definition of willfulness in Ninth Circuit model jury instructions approved in Cheek)." *JC PG

Judge George refused Petitioner Ward's proposed Cheek instructions and stated that he would craft a special instruction. Judge George over the objection of Ward made it clear that there would be no further discussion allowed on this particular instruction. Therefore, Petitioner Ward had to accept Instruction 14 as given since it was the only instruction allowed from a prejudice Judge George. Petitioner Ward contends that this was an abuse of discretion and misconduct by the District Court Judge. This denied Ward his Fifth Amendment

Constitutional Right to due process of law and his Sixth Amendment Right to an impartial trial by jury. When the jury returned for the reading of the instructions, Petitioner had no choice but to stipulate for fear of being in contempt of court.

Ward has a strong belief that all taxes were paid through the Golden-Helmet, wide-scope accounting method and resolves any tax liability to the IRS. The strength of belief is not in dispute as even the District Court Judge has commented on the magnitude of Petitioner Pro Se Ward's firm belief, as had the United States Court of Appeals for the Ninth Circuit.

As becomes obvious on reading the facts and testimony of this case, had Judge George properly instructed the jury, Ward could not have been found guilty because Cheek v. United States, (cited

infra), has clarified the standard to meet the willful requirement necessary under 26 U.S.C. 7201 and 7203 a specific intent crime which the IRS failed to establish in Ward's retrial.

The Evidence adduced at the trial did not meet the specific intent as required in the Indictments to find Petitioner Ward guilty. The full impact of Judge George's preliminary comments to the jury immediately preceding the reading of the jury instructions were intended to be damaging to Ward. Judge George was trying to impress the jury that Ward was some type of a tax rebel. In Ward's opening statement he explicitly and critically dismissed tax rebels and their tactics as a ruse to avoid paying taxes due.

Judge George knew by the comment of Juror 7 that there was confusion and doubt regarding Petitioner Ward's presentation

of the Golden-Helmet, wide-scope accounting method.

The Instructions crafted by Judge George were intended to capitalize and materialize on the confusion and doubt of the jury. Judge George knew by his preliminary comments to the jury and his carefully crafted Instructions, as well as the extraordinary length of instruction fourteen he could and did lead the jury to disregard the reasonable doubt created by Petitioner Ward.

ISSUE #2

The U. S. Attorney failed to allow discovery of exculpatory evidence which includes inspection of seized business records including computer discs and backup discs as required by the Petitioner Pro Se in violation of Rule 16(a)(1)(A) F.R.Cr.P. and a denial to Petitioner of his First, Fifth, and Sixth Constitutional Rights.

The U. S. Attorney intentionally mislead the jury in his opening statement when he stated as follows:

> "Neither the Petitioner nor I & O Publishing Company maintain the normal sort of books and records from which one could compute what either Mr. Ward's income was or the company's income was. Therefore we've had to establish those facts by other means." (see transcript 1-8).

There were extensive records seized that went untouched by either the IRS or the U.S.Attorney's office from November 3, 1986 to date, except for a very few select out-of-context documents which mislead the jury.

This use of select out-of-context documents and the government's refusal to provide timely discovery was exemplified when the U.S. Attorney's office walked in at 9:00 A.M. at the actual start of the retrial of Ward and provided 882 pages of discovery knowing it was impossible for Ward to sort and review this material before the trial. Judge George stated "Well, then I don't see any reason for delay, Mr. Ward.". This is after Ward asked for a recess to examine the voluminous material he received. This material was worthless for use by Ward at his trial and the U.S. Attorney's office knew that this violated Ward's constitutional due process rights and right to a fair and just trial. This constitutes prosecutorial misconduct.

The following statement generates further examples of judicial and prosecutorial misconduct. The facts

cannot be fabricated as the U.S.Attorney is trying to do in their answering brief page 7 as follows:

> "In his initial appeal to this Court, the defendant asserted for the first time that he had been denied full discovery. [AOB in case # 91-10293 at 32] The issue was not considered by this Court in light of the reversal on other grounds. The defendant makes the same claim here. [AOB at 12]
>
> Upon remand for a new trial, the issue was raised before the trial court in the context of a motion for a trial continuance and, following the denial of that motion, in a motion for reconsideration. [CR 152; SECR at 48] The district court refused to continue the trial, determining that the defendant's own delays were the cause of his claimed lack of access to discoverable information. [CR 154; SECR at 56].
>
> The defendant argues insistently that the government had the unfair advantage of having access to his seized materials throughout the investigative and pretrial stages of the proceedings, while he was given only a matter of days to review them. He makes the bold assertions that the government ' "delay [ed] for seven years in providing the seized material," ' {AOB at 14] that there is ' "no justification for the [government] to withhold discovery," ' [AOB at 16] and that the government ' "refused [him] access to

> the seized records necessary" ' for rebuttal. [AOB at 18] However, he fails to cite any significant, dishonored request to inspect upon which to base such allegations. Although consistently maintaining that he wanted to inspect the seized materials -- demonstrating his understanding of that right -- the fact is that the defendant did not fully avail himself of the opportunity to do so."

The U.S. Attorney's office claimed that 800 sheets of unsorted, misfiled, unreadable material all intentionally bundled together were all the discoverable material Ward required. Ward was denied the right to inspect and copy the extensive computer discs, filing cabinets, storage boxes all of which subsequently filled a 10'x 12'x 4' high warehouse storage locker.

The U.S. Attorney's office tries to shift the blame to Petitioner Ward and make it appear that Petitioner Ward was being dilatory. The truth is that the U.S.Attorney was having extreme difficulty getting the cooperation with the Internal

Revenue Service to make arrangements to examine the discovery.

U. S. Attorney alleges that they met Petitioner's discovery requirements with full cooperation with the 800 documents described above.

An example of their cooperation in the **first trial** transcript dated February 11, 1991, the first day of trial, Petitioner Ward stated to the court on page I-32 of the trial transcript.

> "MR. WARD: Your Honor, the Court may please -- just one for the -- to put on the record, I'd like to record that at 8:15 this morning, the Prosecution presented me with a stack of discovery evidence which I have not -- I guess it's...
>
> THE COURT: As I matter of fact, I think you already made that point for Plaintiffs."

Another example dated August 2, 1993, the second trial transcript page I-4, I-5 and I-6.

> "MR. WARD: Your Honor? At 9:00 this morning we were handed 882 pages of discovery, and I would like to have the opportunity during the recess to

examine that discovery, because it may affect the opening statement, and I'd like a few minutes then after with the Government to ask questions. We have some questions on this..

THE COURT: That discovery has been provided to the Defendants, hasn't it?

MR.DAMM: Yes, it has, your Honor. We simply provided him with copies of the documents that he's already received previously...

THE COURT: Long...

MR.DAMM: Previously, your Honor.

THE COURT: Long ago.

Mr.DAMM: That's correct, your Honor.

* * *

THE COURT: Okay.

MR.WARD:I believe there's some additional material, and - I'm sorry.

THE COURT: Is there anything new that has been provided, other than discovery evidence that was supplied months ago?

MR.DAMM: Your Honor, there is some additional information that we acquired only yesterday, which we provided to Mr. Ward today -- updated information from the Internal Revenue Office Service Center.

THE COURT: Well, then I will delay the opening statements. How much by way of...

MR.DAMM: Your Honor, the information that we acquired yesterday is simply an updated listing of the information that the Internal Revenue Service Center...

THE COURT: Just updating the accounts and so forth?

MR.DAMM: That's correct, your Honor.

THE COURT: Is that all it is?

MR.DAMM: That's correct.

THE COURT: So that it would just be current figures?

MR.DAMM: That's correct.

THE COURT: You're talking about interest factoring and things of that nature?

MR.DAMM: Yes. We're talking about just an updated account of the tax returns or the lack of tax returns in question for Mr. Ward and I & O Publishing Company.

THE COURT: But it's just a computation, based upon what you've done in the past.

MR.DAMM: That's correct, your Honor.

THE COURT: Well, then I don't see any reason to delay, Mr. Ward".

The above cooperation demonstrates at both Petitioner Ward's first trial and

second trial that the U.S. Attorney's office provided unusable discovery in a very unprofessional manner and actually misled the court as to the completeness of the discovery and timeliness.

At the first trial, the U.S. Attorney's office could possibly have called it cooperation, but at the second trial providing Petitioner Ward with 882 pages of discovery at 9:00 a.m. at the moment that the trial was to begin is tantamount to denial of due process of law.

The facts remain that the U.S. Attorney is prevaricating about the amount of discovery. The U.S. Attorney's office failed to provide 1 large filing cabinet and 15 large legal size boxes, computer, printer and a large amount of computer discs and backup discs compared to the 800 sheets of extremely low-grade copies given to Petitioner Ward the day the trial was

to begin. The American people need to be aware of the abuses of the U.S. Attorney's office and this information must be made public. Besides, how does the U.S. Attorney justify walking into court the day the trial begins and handing over the discovery and why does the District Court Judge allow the U.S. Attorney to breach the rules of discovery? The State of California punished the defense and O. J. Simpson's attorney's for failure to make discovery.

The U.S. Attorney can not determine what records were necessary for Ward's defense. Likewise, the U.S. Attorney's office failed to even examine in depth the computer discs, backup computer discs containing all of Ward's accounting and business records, or examine the seized records to determine if any of the information on the seized records would be

beneficial or of assistant to Ward's defense.

The District Court Judge still allowed the U.S. Attorney to continue as they have done in the previous trial and that is to deny Petitioner Ward his Brady material especially statements from IRS paid **Informant** Linde Gold.

U.S. Attorney's office consistently denied Ward effective discovery allowed F.R.Cr.P. Rule 16, Rule 2, "Fairness in administration". The IRS has had almost seven years to examine the seized material while the Petitioner has been given ten days. The accountant made a subsequent visit to the IRS and prepared an additional report regarding the seized documents. The volume of seized documents would consume an additional 60 working days in addition to the 18-81 days to clear the many dozens of computer discs.

The discovery represents a huge accumulation of germane documents and seized computers discs for which the Petitioner Ward had no duplicate because all of his business records were seized and in the possession of the IRS. The records should have been available to the Petitioner pursuant the open file policy Local Rules of Practice, Rule 315, and as provided by the F.R.Cr.P. Rule 16(c). The District Court failed to examine the real issue - the problem of the U.S. Attorney's office and the IRS delaying for seven years in providing the seized material to Ward or making available duplicate copies of Ward's computer discs which contained all the accounting and business records.

These seized records would have established that paid **Informant** Linde Gold was the individual who was actually maintaining the records for Petitioner. These discoverable records were critical

to the impeachment of **Informant** Linde Gold, a paid informant of the IRS. Ward provided to the District Court during his first trial the original letters from Linde Gold. Ward wanted these letters returned for use in the second trial and the U. S. Attorney's office agreed, however Ward only received extremely poor, mostly unusable copies of the letters from the court.

In United States v. Bogard, 846 F.2d 563, 566 (9th Cir. 1988)

> "the Ninth Circuit has ruled that continuances to allow an accused to prepare an adequate defense should be granted where fairness and due process concerns of the accused are implicated".

Even though this is the case and statutory law, Judge Lloyd D. George still denied the continuance to Petitioner Ward, who was not afforded adequate time to copy the discoverable material.

The IRS had a legal duty to provide this information to Petitioner properly

after he was arrested March 29, 1990. The IRS could have conveniently made duplicate copies of the computer discs or simply have given the backup computer discs from the seized computer.

The United States Supreme Court should look very carefully at the credibility of the U.S. Attorney's office claim of providing full discovery to Petitioner Ward. The record is clear that the U.S. Attorney failed to provide copies of I & O Publishing Company's computer discs for seven years.

The U. S. Attorney signed an open file policy. The U. S. Attorney's office failed to comply with the open file policy in violation of Rule 16(a)(1)(A) F.R.Cr.P. and Rule 16(d)(2) as well as delaying discovery information to such a late date that Petitioner would not have time to properly prepare his defense.

The U. S. Attorney entered into a Joint Discovery Statement, sub-section C. which reads:

> "Prior to trial, the Government will permit the Petitioner to inspect and copy or photograph books, papers, documents, photographs, or copies, or portions thereof, which are within the possession, custody, or control of the Government, and which are intended for use by the Government as evidence in its case-in-chief at trial or were obtained from or belonged to the Petitioner or are otherwise material to the preparation of the Defense.".

The Assistant U. S. Attorney's suppression of Exculpatory evidence and failure on the part of the Government denied the Petitioner his rights to the Fifth Amendment of the Constitution and Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 15, 83 S. Ct. 1194 (1963). Also his right to discover evidence which is favorable to him Brogdon v. Blockburn, 790 F.2d 1164 (1986).

There is a substantial question as to whether the delay and deprivation of discovery to Petitioner Ward usurped

Petitioner's Fifth and Sixth Amendment Constitutional Rights.

ISSUE #3

The U.S. Attorney's office failed to establish a Prima Facie case and the District Court erred when it failed to grant Petitioner Ward's motion to dismiss and Petitioner Ward moves the Court of Appeals to review the decision of the jury based on plain error, abuse of discretion by the District Court, and to prevent a manifest miscarriage of justice, and if F.R.Cr.P. Rule 29(a) and 29(b) are constitutionally vague as written denying petitioner Ward of due process of law.

This is a simple question, a simple question as a matter of law. Did the U.S. Attorney's office properly identify that Ward was the proper person to file the tax return of I & O Publishing Co.? The U.S. Attorney's office failed to offer direct evidence to establish all elements necessary to find that Ward was a person liable to file the tax returns of I & O Publishing Co.

Judge George erred when he failed to sustain Ward's motion to dismiss counts 4,

5 & 6 of the indictment after the U.S.Attorney's office failed to establish the necessary elements of a prima facie case regarding indictment counts 4, 5 & 6. This error substantially prejudiced Petitioner Ward.

An example of the direct testimony by an Internal Revenue Service agent testifying on behalf of the U.S. Attorney's office follows;

> "Q Mr. Uhlott, as a corporation, was I & O Publishing required to file tax returns for the years 1983, 1984 and 1985?
>
> A. Yes, a corporation is required to file a tax return if they're subject to tax under Subtitle
>
> A. And it doesn't make any difference how much gross receipts they have or whether they have a gain or a loss, they are required to file a return if it's an active corporation.
>
> Q Uhlott, yeah. Are you taking the transactions from I & O Publishing and taxing that income to I & O?
>
> A. I Haven't made any tax computations for I & O Publishing Company.

Q Wouldn't that be the result of what you're doing though? Would they be attributed to I & O Publishing? These computations that you do for I & O, would it be then using a computation as a taxable income for I & O?

A No, sir, I haven't done any computations for I & O at all. I have taken these transactions where I & O wrote checks that were payable to you or negotiated by you or on your behalf. I have not done any computation of any kind for I & O Publishing.

Q Would these figures be used for computations for I & O Publishing?

A You mean if somebody among -- they would be considered, sure. I mean, they wouldn't result in any tax to I & O without the addition of all the transactions for I & O that, to my knowledge, ***haven't been introduced as evidence here***.

Q So you're computations are for what entity?

A For your personal tax return.

Q Now, when the IRS presented these, they had both for I & O and personal. Now, you're doing for one side, personal?

A Yes, sir, ***they didn't introduce any evidence of all the transactions of I & O.*** To compute a tax for I & O, you would have to know the income and the expenses and the credits and perhaps losses from prior years or

subsequent years. ***There's just many things you'd have to know that hasn't been introduced.***

BY MR. WARD:

Q Are you saying that I & O Publishing Company did not make a profit?

A No, sir, I'm saying that based on the evidence that's been presented in Court, I don't know if they made a profit or had a loss or anything. I don't know." (Trial transcript page II-67, 68 and 69).

An examination of the above testimony by Mr. Uhlott establishes several issues.

(1) There was nothing contained in Mr. Uhlott's testimony that Wallace Ward was the person to file tax returns for I & O Publishing Co.

(2) Mr. Uhlott did not establish by his testimony if I & O Publishing Co. was subject to tax under Subtitle A. Nor was any information provided by Mr. Uhlott as to what constituted a corporation subject to tax under Subtitle A.

(3) Instruction 19, (cited Infra) specifically states in Section First

"...to make a return of the income of I & O Publishing, Inc..." Mr. Uhlott's testimony was specific that he could not determine if there was either an income or a loss.

Mr. Uhlott made it clear that there was insufficient evidence presented by the government to determine if I & O Publishing Co. "...if they made a profit or had a loss or anything. I don't know." Uhlott Trial transcript pg.II-69.

The following cited Instruction 19 was given as the appropriate instruction to the jury for their determination if a violation of 26 U.S.C., Section 7203 occurred (Appellee's opening brief page 40 and Trial transcript III-51, 52).

> [INSTRUCTION NO. 19]
> "The Defendant is charged in Courts 4, 5 and 6 with the failure to file an income tax return in violation of Title 26 of the United States Code, Section 7203.
>
> Three essential elements must be proved in order to establish this offense as charged in the indictment:

> First, that the Defendant was a person required by law or regulation to make a return of the income of I & O Publishing Company, Inc. for the taxable years ending December 31, 1983, 1984 and 1985:
>
> Second, that the Defendant failed to make such returns at the time required by law, which time was on or before March 15, 1984, 1985 and 1986; and
>
> Third, that the Defendant failed to make the returns -- that the failure to make the returns was willful.
>
> As has been said before, the burden is on the prosecution to prove every element of the offense charged beyond reasonable doubt. The law never imposes on the defendant in a criminal case the burden of producing any evidence or of calling any witnesses." (See transcript III-51, 52).

The above three essential elements must be proved in order to establish this offense as charged in the indictment.

The U. S. Attorney's office is relying on only one element of the offense's charge and that I & O Publishing Co. did not file or pay any income taxes.

The burden is on the prosecution to prove each of the three essential elements as charged in the indictment and each of the respective essential elements must be proved beyond a reasonable doubt. Even if the government proved two of the three elements, the Defendant could not be found guilty. Each essential element is independent of the other two essential elements and must be proved independently. This is true even if the three essential elements are interdependent to each other. Basically a failed essential element (-) combined by two successfully alleged elements (+) (+) would still equal a negative proposition and thus counts 4, 5, & 6 against Ward would fail.

> "First, that the Defendant was a person required by law or regulation to make a return of income of I & O Publishing Company, Inc. for the taxable years ending December 31, 1983, 1984 and 1985." (Trial transcript III 51-52, Petitioner Ward's opening brief page 40.)

Each element of the offense must be proved beyond a reasonable doubt. The testimony at the trial failed to establish that Ward was the person required by law or regulation to make a return of the income of I & O Publishing Co. No law or regulation was introduced at Ward's trial identifying him as the proper party to file tax returns. Therefore, it is necessary to rely exclusively on the instructions which were the criterion established by the U.S. District Court to determine innocence or guilt of Petitioner. Recent Supreme Court decisions are County Court of Ulster v. Allen, 442 U.S. 140,99 S.Ct. 2213, 60 L.Ed.2d 777(1979), Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39(1979), and Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344(1985). As a result of these decisions it is clear, if it wasn't before, that it

is never permissible to shift to the defendant the burden of persuasion to disprove an element of a crime charged by means of a presumption, and of course, that a conclusive or irrebuttable presumption operating against the criminal defendant is also unconstitutional.

"(1) A conclusive or irrebuttable presumption operating against a criminal defendant is unconstitutional.", (cited infra).

"(2) The burden of a persuasion with respect to an element of a crime as defined may never be shifted to a criminal defendant by means of a presumption.", Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344(1985).

The case law is settled that the burden rests on the U.S.Attorney's office to establish a prima facie case. There was not any direct testimony to establish relevant law and regulations or even a

definition explaining who constitutes a person required to file the tax returns on the part of the corporation. It cannot be based on income to I & O Publishing Co. as the government's witness, Mr. Uhlott, has testified that he could not determine if there was a gain or loss based because of insufficient evidence provided to him by the U.S. Attorney's office. And, it cannot be assumed that Petitioner Ward is the proper person as such assumptions are unconstitutional.

Actually, the IRS Informant, Linde Gold, testified she maintained the books and records and made deposits for I & O Publishing Co. Ward did testify in his own defense **and the United States failed to cross-examine him and to establish that if he was the proper person to file the income tax returns**.

ISSUE #4

Judicial, Prosecutorial, and Juror misconduct denied Petitioner Ward of his Fifth Amendment Constitutional Right to due process of law and his Sixth Amendment Right to trial by an impartial jury.

The trial of Petitioner Ward was marred by repeated acts of misconduct and prejudice by the U. S. Attorney, the District Court Judge and the conduct of the jury. The apparent scenario by the U.S.Attorney's office and a prejudiced District Court Judge was to obtain a conviction of Ward at any cost. This was assisted by the confusion of the jury. These instances are described as follows:

(1.) The District Court Judge erred when he failed to examine other jurors when he was advised by Juror #7 that other jurors were discussing the issues from the trial and before the case was submitted to the jury for deliberation. See Trial Transcript III-6 as follows:

"THE COURT: (to the Clerk) Why don't you bring Ms. Reed in?

THE CLERK: Juror #7?

THE COURT: She's 7. (Pause)

THE COURT: Ms. Reed, this is a microphone, if you will...

I understand, Ms. Reed, that you approached the law clerk this morning, Mr. Young, and indicated to him that the jury has been discussing the idea of the golden helmet and you don't understand that idea. Is that correct?

JUROR #7: Yes, sir. The question was asked amongst all of us...

THE COURT: Why don't you come right over here.

JUROR #7: Yes, sir. The question was asked of all of us. We looked at each other like ' "Do you understand what the golden helmet is?" ' And nobody seems to really know.

THE COURT: Didn't you understand my instructions to you that you must not discuss this case until the Court tells you that you're to discuss the case?

JUROR #7 Yes, sir."

(2.) The District Court Judges ruling of vindictiveness on the increase

of Petitioner Ward's sentence as stated in Issue #5 herein.

(3.) The handling of a selected jury instruction and the emotional manner the court addressed the jury prior to the formal reading of the jury instructions as described in Issue #1 herein.

(4.) The failure of the District Court Judge to independently determine if the U.S.Attorney's office did provide all exculpatory evidence to Ward after he filed a motion for a continuance. As described in Issue #2 herein.

United States v. Clifford, 361 F.2d 365 (1966),

> "Justice under the law is the due of both the accuser and the accused. To this end, it is the duty of the judges to work for equal justice under the law, even 'to least among us'".

Kuhl v. District Court,366 P.2d 257, 260 (1960).

(1.) Prosecutorial misconduct was demonstrated by their failure to make discovery of all exculpatory evidence which is described in detail in Issue #2. The U.S.Attorney deceived the United States District Court when they stated that all discovery was provided to Ward when in fact it wasn't. See Issue #2 herein. See United States v. Lai, 944 F.2d 1434, 1438 (9th Cir. 1991).

Brown, Jr. v. Borg et al. and United States of America, 951 F.2d 1011, 1014 (9th Cir. 1991) regarding failure to provide exculpatory evidence.

> "The proper role of the criminal prosecutor is not simply to attain a conviction, but to obtain a fair conviction."

Also 976 F.2d 475 (9th Cir. 1993).

(2.) Petitioner Ward was also denied an impartial trial by the jury because other jurors discussed his case prior to being submitted to the jury for their deliberations.

(3.) Prosecutorial misconduct by Mr. Bullard when in his final argument he argued and quoted out-of-context portions of the poker book which was not in evidence and without the opportunity of rebuttal by Petitioner Ward.

See Hughes v. Borg, United States Court of Appeals, 898 F.2d 695, 699 (9th Cir. 1989)

> "State defendants have a Federal Constitutional right to an impartial jury and jurors have a correlative duty to consider only the evidence that is presented in open court."

See also United States of America v. Maree, 934 F.2d 196, 2d (9th Cir.)

> "...where extraneous material is submitted to the jury, the defendant will receive a new trial if the court finds a 'reasonable possibility' that the material could have affected the verdict".

See also United States v. Navarro-Garcia, 15 F.3rd 1091 (9th Cir. 1994).

Petitioner Ward was denied his Fifth and Sixth Constitutional Amendment

protections by the errors and the misconduct at his trial by the District Court Judge, U. S. Attorney and the misconduct of the jury-improperly discussing his case before submission to the jury.

ISSUE #5

The District Court Judge erred when he increased Petitioner Ward's sentence to five years and added additional conditions without a showing of changed circumstances on a pre-guideline case.

The prejudice and judicial misconduct prevalent at Petitioner Ward's retrial was evident at his sentencing after his retrial. This was demonstrated by the United States Court of Appeals remanding the mental health portion ordered by Judge Lloyd D. George. A careful review of the case law would reveal that the sentencing judge cannot increase the sentence of a defendant upon retrial after a reversal of a previous conviction absent special or changed circumstances. However, this is exactly what occurred in Ward's case. There are no special or changed circumstances in Ward's case. Petitioner's incarceration record as well as his record since his release would

demonstrate that Ward was a model prisoner and a responsible citizen. Even the presentence report recommended a term of probation of only 30 months not the 60 months Judge George imposed. Judge George knew the case law indicated that on a retrial the term and conditions of the sentence can not be increased on a non-guidelines sentencing. Judge George disregarded the presentence report and established case law and increased both the term of probation from four to five years and added the additional condition of mental-health counseling. However, this portion of the increased sentence was remanded, and the issue became moot. Even still the United States Court of Appeals disregarded United States v. Soloman, 825 F.2d 1292, 1301 (9th Cir. 1987) even though the Court of Appeals rationalized their concurrence with "Solomon".

Judge George knew Ward was a peaceful man with strong convictions. Judge George knew there were no special circumstances to justify his increasing the sentence of Ward's term of probation. There were no new or on-going offenses for Judge George to rely on as I & O Publishing Co. ceased existence when Ward was incarcerated. There was proof of a current tax filings by Ward. There are no on-going violations of the same alleged offense.

Judge George had neither a factual reason nor a legal reason to increase or add circumstances at sentencing. North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S. Ct. 2072 (1969), United States v. Smith, 962 F.2d 923, 932 (9th Cir. 1992) follows North Carolina v. Pearce, (cited infra). And, the law is clear and current as the 9th Circuit Court of Appeals demonstrated in 1992 and when it reestablished North Carolina v. Pearce,

(cited infra) as the case law-of-the-land which has been the case law.

The only reason that Judge George added these conditions was due to the fact that he was prejudiced against Ward and his public writings and publications that were critical of Judge George's subjective ego "justice" practices. So prejudiced was Judge George toward Petitioner Ward that he disregarded current case law, abused judicial discretion and arbitrarily interposed his own subjective law.

Judge Lloyd D. George was disturbed that his previous trial of Ward was reversed and he was so distressed this and the political writings of Ward that he disregarded the law and interposed his own prejudices. The political writings of Petitioner Ward demonstrate the lost values and wastes of government along with the abuses and excuses of bureaucrats and elected officials. The American people

also grew impatient with the abuses of the bureaucracy and of the politicians and acted accordingly by expelling the majority Democratic party in both the House of Representatives and the United States Senate. With Petitioner Ward's writings, a sea change has occurred in America. This revolution of the American people against the abuses of the bureaucracy and of the politicians is just in the embryo stage and will explode into the 21st century.

The U. S. Attorney's office is stating that since Petitioner Ward exercised his right to his constitutional protected First, Fifth and Sixth Amendment Rights he should be punished with an increased sentence.

U. S. Attorney's office argue that the difference at Petitioner Ward's second trial was his testimony at his second trial regarding his Golden Helmet wide-

scope accounting method. However, this argument also fails as the District Court Judge was well aware of Petitioner Ward's concept of the Golden Helmet and he was familiar with Ward's writings, testimony and statements from his previous, first trial

Ward could also demonstrate that he had filed his tax returns up to date. Any litigation by Ward with the IRS relates to resolving past disputes. Even the IRS makes this resolution difficult for Ward as the IRS had all the records.

However, Ward will always be a political activist as permitted by the First Amendment of the Constitution. But, Ward is moving to other areas of interest and is attempting to resolve any past tax disputes with the IRS. Ward will continue to pursue each and every legal remedy in his pursuit of political activism to oust the parasitical elites in government and

replace them with business-minded value producers.

The U. S. Attorney's office argues that District Court Judge George is not prejudiced. This argument is ridiculous. The fact is that Judge George is angry and prejudiced toward Ward is demonstrated by the judge's action and conduct when he spoke disparagingly about the oath to be given to Petitioner Ward. (See Trial transcript page II-74) as follows:

> "THE COURT: Okay. At this point is there anybody else that to your mind is going to require this oath being used?
>
> "MR. WARD: No.
>
> THE COURT:Everybody else will take...
>
> MR. WARD: That is correct.
>
> **THE COURT:** ***...the oath that has been used for several hundred years?***
>
> MR. WARD: Yes.
>
> THE COURT: And you have no objection to that?
>
> MR. WARD: I have no objections to it.'

The above testimony by Judge George was meant to be vindictive and an affront to the opinion of the United States Court of Appeals.. See United States v. Ward, 989 F.2d 1015, 1019 (1992) where the court of appeals stated:

> **"Neither the magistrate nor the district court cited to any of these authorities relying instead on their perception that the standard oath had not changed ' "for hundreds of years." '** While oaths including the familiar ' "truth, whole truth, and nothing but the truth" ' formulation date back at least to the seventeenth century, see 6 Wigmore, Evidence § 1818(2) (Chadbourne rev. 1976), **the principle that the form of the oath must be crafted in a way that is meaningful to the witness also predates our constitution."**

When a defendant's sentence after remand exceeds the sentence imposed at the first trial, this Court presumes that the new sentence was vindictive and, absent an adequate explanation by the district court, would strike it down as unconstitutional. United States v. Bay, 820 F.2d 1511, 1513(9th Cir. 1987). ...'

> "[A] fter retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." '

Wasman v. United States, 468 U.S. 559, 572, 104 S.Ct. 3217, 3225, 82 L.Ed.2d 424 (1984).

If within the statutory guidelines, the district court's order is reviewed for abuse of discretion. United States v. Snider, 957 F.2d 703, 706 (9th Cir. 1992).

Wasman v. United States, (cited infra) was followed by United States v. Bay, 820 F.2d 1511(9th Cir. 1987) and endorses North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969) where the court held

> "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

The U. S. Attorney states the following in their answering brief page 14, 15:

> "When a defendant's sentence after remand exceeds the sentence imposed at the first, this Court presumes that the sentence was vindictive and, absent an adequate explanation by the district court, would strike it down as unconstitutional. United States v. Bay, 820 1511, 1513 (Cir. 1987).

This is exactly the situation in this case and that being that Judge George was being vindictive and his vindictiveness permeated the entire trial.

Petitioner conducted the trial in a very professional manner, with proper objections knowing that Judge George would systematically deny his objections. Petitioner carefully planned his case presentation, and a professional closing argument. There was no acrimony at Ward's second trial. Petitioner presented testimony and an affidavit establishing that he was resolving his dispute with the IRS. The record would show that the

changed circumstances were all positive. However, this changed circumstance to that of cooperation does not diminish Ward's firm political beliefs. To force Ward to forgo his political beliefs would make the United States Bill of Rights a mockery. The District Court erred in increasing the sentence of Petitioner Ward.

CONCLUSION

Petitioner Ward has detailed very carefully and as thoroughly as possible the major errors in his case that denied him of substantial due process of law. From an improperly drawn instructions with resulting comments in an inappropriate manner and the District Court courting the jury. Petitioner was unable to obtain discovery and the District Court failed to properly sustain Petitioner's motion to dismiss due to failure on the part of U. S. Attorney to prove all the elements of the charge constituting failure to file a tax return on the part of a corporation and establish a prima facie case. District Court prejudice, U. S. Attorney misconduct, and improper jury conduct added to legal problems Petitioner Ward had to surmount. Finally, the District Court Judge vindictively increased Petitioner Ward's sentence. The United

States Court of Appeals turned back the added sentence of Mental Health Counseling.

All of these facts are detailed thoroughly in the Issues presented in this petition for certiorari. Petitioner has been denied his Constitutional Right to Fifth Amendment due process of law and his Sixth Amendment Constitutional rights.

This denial of due process of law is resulting in a vast departure by the various Circuits and District Courts as a result of Cheek v. United States, 111 S. Ct. 604, 610, 611(1991). While a majority of the jurisdictions are following the above cited case, other jurisdictions primarily District Courts are interposing their objection to the "Cheek" decision as was true in the instant case. This is an important case with an outstanding judicial history, but it requires the

Supreme Court's power of supervision so as to maintain the integrity of the decision.

The writ for certiorari should issue.

Respectfully Submitted,

Wallace Ward

WALLACE WARD
Petitioner Pro Se
2756 N. Green Valley Pkwy.
Suite 162
Henderson, Nevada 89014

NO.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WALLACE WARD,
DEFENDANT-PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF
CERTIORARI

Wallace Ward Pro Se
2756 N. Green Valley Pkwy.
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702 434-7237

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
WALLACE WARD	)
	)
Defendant-Appellant	)

No. 93-10703

D.C. No. CR-90-000057-LDG

MEMORANDUM*

FILED: SEP. 26, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

Appeal from the United States District Court for the District of Nevada Lloyd D. George, District Judge, Presiding

Argued and Submitted, September 12, 1994 San Francisco, California

Before: FARRIS and BEEZER, Circuit Judges, and McLaughlin, District Judge.**

**The Honorable Linda H. McLaughlin, United States District Judge for the Central District of California, sitting by designation.

Wallace Ward appeals pro se his conviction, upon retrial, of three counts of attempting to evade or defeat income tax, 26 U.S.C. § 7201, and three counts of failing to file income taxes, 26 U.S.C. § 7203. He argues that the government failed to disclose material evidence as required by Fed. R. Crim. P. 16 and that the district court erred in denying his motion for a continuance. He also argues that he was denied a speedy trial, that the district court erroneously denied his motion to suppress, that the court improperly instructed the jury, that the evidence was insufficient to support the guilty verdict, and that the district court erred in imposing a more severe sentence after retrial than was imposed upon his conviction at his first trial.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm Ward's conviction but remand a portion of his sentence.

I

Ward argues that the government failed to timely disclose evidence in its possession and intended to be used in its case in chief, as required by Rule 16 of the Federal Rules of Criminal Procedure. He raised this issue before the district court in a motion for a 60-day continuance, which the district court denied.

We review for an abuse of discretion the denial of a motion for continuance. United States v. Tham, 960 F.2d 1391, 1396 (9th Cir. 1992).

The district court concluded that Ward had failed to establish that the government intentionally withheld evidence and that Ward himself was responsible for delaying the discovery process. In his opening brief, Ward concedes that "(t) he District Court was correct when it made the statement that there had been adequate time to inspect the discovery material." The record reflects, moreover, that the government timely provided Ward access to all seized materials as required by Rule 16 (a) (1) (C) and that Ward waited until six days before the start of his second trial to begin inspecting the government's documents in earnest. Additionally, Ward already had an opportunity during his first trial to view the government's evidence, which was, in all material respects, the same as that presented in

the second trial. He thus failed to demonstrate that the denial of his motion resulted in actual prejudice to his defense. The district court did not abuse its discretion in denying Ward's motion for a continuance. 1/

1/ Ward's argument that the government improperly withheld impeachment evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963) also lacks merit. He fails to point to any instances in the record in which he specifically, or even generally, requested Brady material that the government did not disclose to him. Ward does not establish, moreover, that any evidence the government failed to disclose is "of a kind that creates a reasonable doubt that would not otherwise exist." United States v. Lehman, 756 F.2d 725, 729 n.2 (9th Cir.) (internal quotations omitted), cert. denied, 474 U.S. 994 (1985).

II

Ward argues that the government did not commence his retrial within the time required by the Speedy Trial Act.

Under the Speedy Trial Act, retrial of a defendant must commence within seventy days from the date the mandate for retrial is issued. 18 U.S.C. § 3161 ; see United States v. Crooks, 826 F.2d 4, 5 (9th Cir. 1987). "Delays due to pretrial motions are excluded from the computation of the 70 days." United States v. Antoine, 906 F.2d 1379, 1380 (9th Cir.), cert. denied, 498 U.S. 963 (1990) ; see 18 U.S.C. § 3161 (h) (1) (F).

Here, the mandate ordering retrial was issued on April 23, 1993. Ward's second trial commenced 101 days later, on August 2, 1993. At least 33 days are excludable, however, due to pretrial motions filed by ward. For instance, on June 2, 1993, Ward filed a Motion to Allow

Defendant's Witnesses to Utilize the Honesty Oath. The motion was denied thirty days later on July 2, 1993. On July 6, Ward moved for a continuance. His motion was denied July 9. After subtracting excludable days, the total delay between the mandate and commencement of Ward's retrial was fewer than 70 days. Thus, Ward was brought to trial within the period mandated by the Speedy Trial Act.

III

Ward argues that the district court erred in denying his motion to suppress evidence seized from his residence and business offices.

Ward initially moved to suppress the evidence at the commencement of his first trial. The district court denied the motion. He moved for suppression again during presentation of the government's case in chief at retrial. The district

court denied the motion on the basis that it was untimely.

Federal Rule of Criminal Procedure 12 (b) (3) requires that motions to suppress evidence be made before trial. Failure to make a timely motion "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(f).

We review for an abuse of discretion the district court's refusal to hear an untimely suppression motion. United States v. Booker, 952 F.2d 247, 249 (9th Cir. 1991). Ward asserted no new grounds for suppression and established no "cause" for relief from the waiver of Rule 12 (b) (3) and (f). See United States v. Miller, 984 F.2d 1028, 1031 (9th Cir.), cert. denied, 114 S. Ct. 258 (1993). The district court did not abuse its discretion in denying Ward's motion to suppress.

IV

Ward contends that the district court erred in admitting irrelevant evidence and testimony that lacked proper foundation.

The government argues that Ward failed to preserve this issue for appeal because the district court did not formally rule on his motion in limine, filed on the first day of his retrial. Ward, however, contemporaneously objected to the admission of the evidence that he claims was unfairly prejudicial. He objected at trial to any reference to social security or employer identification numbers and to the admission of exhibits containing information relating to business activities in years for which he was not charged. Ward also objected to the admission of testimony relating to banking and currency laws for which foundation was not properly laid as to the witness' expertise. The district court

required the government to lay foundation, but otherwise overruled each of Ward's objections.

We review the district court's evidentiary rulings for an abuse of discretion. See United States v. Crespo de Llano, 838 F.2d 1006, 1018 (9th Cir. 1987). The evidence of social security and employment numbers and of events occurring outside the charged tax years was relevant to proving Ward's intent to evade or defeat payment of income tax and was not unduly prejudicial. See, e.g, United States v. Voorhies, 658 F.2d 710, 715 (9th Cir. 1981). Additionally, proper foundation was laid for the testimony regarding the banking and currency laws. The district court did not abuse its discretion.

V

Ward next argues that the district court failed properly to instruct the jury that his conduct could not be considered willful if he acted due to a good faith misunderstanding of the law. He acknowledges that the judge in fact gave this instruction, but contends that it should have been given in a separate instruction instead of "buried in a rather long involved instruction relating to the element of willfulness." He also contends that a later portion of the instruction served to "nullify" the impact of the good faith language.

We will overturn a conviction on the basis of imperfectly formulated jury instructions only upon a showing of abuse of discretion. United States v. Faust, 850 F.2d 575, 583 (9th Cir. 1988), "[A] defendant is not entitled to any particular form of an instruction so long

as the instructions given fairly and adequately cover his theories of defense." Id. Because Ward did not object to the instructions as given, we review for plain error. United States v. Kessi, 868 F.2d 1097, 1102 (9th Cir. 1989).

Although in form the instruction Ward requested was given as part of a longer jury instruction containing additional instructive language, the longer instruction nonetheless fairly and adequately covered Ward's theories of defense. In giving the instruction, the district court committed no prejudicial error affecting Ward's substantial rights. See id.

VI

Ward argues that the district court erred in denying his Rule 29 motion for acquittal on Counts 4, 5 and 6, because the evidence was insufficient to establish

that I & O Publishing was a viable legal corporation.

Although Ward moved for acquittal at the close of the government's case, he failed to renew the motion at the close of his case. He therefore effectively waived any objection to the sufficiency of the government's evidence. United States v. Comerford, 857 F.2d 1323, 1324 (9th Cir. 1988), cert. denied, 488 U.S. 1016 (1989). Nonetheless, "we may review the denial of a nonrenewed motion for acquittal, but only 'to prevent a manifest miscarriage of justice' or for plain error." Id. (quoting United States v. Ochoa-Torres, 626 F.2d 689, 691 (9th Cir. 1980)).

Sufficient evidence in the record supports the jury's finding that I & O Publishing was a corporation and that Ward had the responsibility to make a return of the company's income for the taxable years

in question. The district court properly denied Ward's motion for acquittal.

VII

Ward also contends that he was denied a fair trial because the district judge was prejudiced against him. He argues that the trial judge abused his judicial discretion by making rulings "based on subjective law rather then [sic] objective law."

We will order a new trial only if the record discloses actual bias on the part of the trial judge. See United States v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986). The record does not support Ward's argument that he was denied a fair trial.

VIII

Ward contends that the imposition of assessments and the costs of prosecution violated his due process rights. His arguments are wholly without merit. The district court had authority under 26

U.S.C. §§ 7201 and 7203 to impose on Ward the costs of prosecution. The imposition of assessments, moreover, does not violate due process. See United States v. Smith, 818 F.2d 687, 691 (9th Cir. 1987).

IX

Ward argues that the district court acted with vindictiveness in increasing his sentence after his second trial by imposing an additional year of probation and by requiring him to participate in mental health counseling as a condition of his probation.

When a defendant has successfully attacked his first conviction, vindictiveness for his success "must play no part in the sentence he receives after a new trial." North Carolina v. Pearce, 395 U.S. 711, 725 (1968). To assure the absence of a retaliatory motivation, "whenever a judge imposes a more severe sentence upon a defendant after a new

trial, the reasons for his doing so must affirmatively appear." Id, at 726. The reasons must be based on the conduct of the defendant or new events occurring since the first trial. Taylor v. Kincheloe, 920 F.2d 599, 607 (9th Cir. 1990) (citing Wasman v. United States, 468 U.S. 559 (1984).

The district judge stated that his reasons for extending the probationary period included his concern that Ward intended to continue disregarding his tax obligations. The judge extended the court's jurisdiction over Ward in order to "see to it that [Ward], like anyone else, meets these obligations." These reasons are supported by objective information in the record and justify the increase in Ward's probationary sentence.

The district judge did not, however, provide an affirmative, legitimate explanation for requiring mental health

counseling as a condition of Ward's probation, and thus did not overcome the presumption of a vindictive motivation. See United States v. Solomon, 825 F.2d 1292, 1301 (9th Cir. 1987). We do not ignore Solomon, which requires reversal if the factors relied upon are not enumerated, but where, as here, the record shows that the defendant's testimony at retrial and the sentencing recommendation of the presentence report provide a non-vindictive basis for this portion of the sentence enhancement, an opportunity for the court to acknowledge the factors relied upon is appropriate. We therefore remand the portion of Ward's sentence that requires mental health counseling to afford the district court an opportunity to identify objective information in the record justifying this increase in Ward's sentence.

X

The remaining issues raised in Ward's appellate brief were not presented to the district court. We generally will not consider an issue raised for the first time on appeal. United States v. Glores-Payon, 942 F.2d 556, 558 (9th Cir. 1991) (citation omitted). Additionally, the issues are not supported by argument and are therefore deemed abandoned. See American Int'l Enters., Inc. FDIC, 3 F.3d 1263 n.5 (9th Cir. 1993).

We affirm Ward's conviction and his sentence of five years probation, but remand the counseling portion of Ward's sentence.

AFFIRMED in part and REMANDED.

A TRUE COPY
ATTEST
Oct 31 1994
Clerk of Court

by Adreeime H Hickman
Deputy Clerk

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
WALLACE WARD	)
	)
Defendant-Appellant	)

No. 93-10703

D.C. No. CR-90-000057-LDG

ORDER

FILED: OCT. 21, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: FARRIS and BEEZER, Circuit Judges, and McLAUGHLIN, District Judge.*

Appellant's petition for rehearing is denied.

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*The Honorable Linda M. McLaughlin, United States District Judge for the Central District of California, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WALLACE WARD, *Defendant-Appellant.*	No. 91-10293 D.C. No. CR-90-0057-LDG ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
May 11, 1992—San Francisco, California

Filed August 19, 1992
Amended April 1, 1993

Before: Betty B. Fletcher, Cecil F. Poole and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Fletcher; Dissent by Judge Poole

SUMMARY

Individual Rights/Constitutional Rights/Religious Freedom/Criminal Law and Procedure/Litigation and Procedure

Reversing a district court judgment of conviction and remanding for a new trial, the court of appeals held that the district court abused its discretion when, by not allowing

appellant to swear to an oath of his own creation, appellant was precluded from testifying in his own defense.

Appellant Wallace Ward was indicted for tax evasion and failure to file income tax returns. Ward filed a motion to challenge the traditional oath given and proposed an alternative oath that replaced the word "truth" with the phrase "fully integrated Honesty." A magistrate denied the motion, stating that an oath or affirmation that had been administered in courts of law throughout the United States to millions of witnesses for hundreds of years should not be required to give way to Ward's idiosyncratic distinctions between truth and honesty. The district court affirmed the magistrate's decision. At trial, Ward offered to take both the standard oath and his oath. Although the prosecutor was amenable to the compromise, the district court refused to allow it. At the close of the government's case, the district court again refused Ward's request to testify under his oath. Ward did not testify or present witnesses. The jury convicted Ward. On appeal, Ward argued that the district court's insistence on an oath that violated his beliefs abridged his First Amendment right to free exercise of religion and his Fifth Amendment right to testify in his own defense.

[1] While courts may not determine the truth or falsity of matters of faith, even so the court had to determine as a threshold matter whether Ward's beliefs were within the ambit of the First Amendment. For Ward to invoke the protection of the Religion Clauses, his claims must be rooted in religious belief. Here, the court concluded that Ward professed beliefs that were rooted in religious belief. [2] Ward's beliefs were protected if they were sincerely held and were, in Ward's scheme of things, religious. The definition of religious beliefs in the free exercise context included Ward's system of principles. [3] To distinguish the genuine from the sham and absurd, the focus of judicial inquiry was not definitional, but devotional. The question was whether Ward was sincere, and whether his beliefs were held with the strength of

traditional religious beliefs. Ward demonstrated the sincerity of true religious conviction. His beliefs were protected by the First Amendment. [4] While oaths including the familiar "truth, whole truth, and nothing but the truth" formulation date back at least to the seventeenth century, the principle that the form of the oath must be crafted in a way that is meaningful to the witness also predates the constitution. [5] Therefore, under the circumstances of this case, the district court clearly abused its discretion in refusing Ward's oath and preventing his testimony. [6] However, Ward could not vindicate what he perceived to be his right to have all his witnesses sworn to his oath. Ward had no standing to assert the First or Fifth Amendment rights of others.

Dissenting, Judge Poole stated that the majority's accomodation of Ward's purely secular philosophical concerns will result not in protection of a valuable constitutional right but in numerous wasteful and time-consuming attacks on the oath mandated as a means of guaranteeing truth and of expediting the adminsitration of justice.

COUNSEL

Wallace Ward, Boulder City, Nevada, Pro Per, for the defendant-appellant.

Robert Bork, Assistant United States Attorney, Las Vegas, Nevada, for the plaintiff-appellee.

ORDER

The opinion filed August 19, 1992, slip op. 9969, is amended as follows:

1. Change "(1994)" to "(1984)" in last line of first paragraph in Discussion section, page 9973.

2. Following "*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)" in second paragraph of Discussion section, page 9973, insert the following:

> But what is a religious belief? That is the question. In describing "the richness and variety of spiritual life in our country," the Supreme Court has noted that some of the more than 250 sects in the United States "believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." *United States v. Seeger*, 380 U.S. 163, 174 (1965). "There are those," the Court continued, "who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss." *Id.* at 174-75. In short, the religious fabric of this country is one of a "vast panoply of beliefs." *Id.* at 175.
>
> In determining whether Ward's own peculiar notions[1] are protected as religious beliefs, "[the] task is to decide whether the beliefs professed . . . are sincerely held and whether they are, in [Ward's] own scheme of things, religious." *Id.* at 185; *see also Welsh v. United States*, 398 U.S. 333, 339 (1970) (quoting same language in *Seeger*).

3. New footnote 1, to added text "own peculiar notions":

> [1] The peculiarity or uniqueness of Ward's creed is irrelevant; "[a] religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights." *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977),

cited in Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981).

4. Insert ", then," following " 'Religious' beliefs," page 9973.

5. Replace "*Welsh v. United States*, 398 U.S. 333, 340 (1970).[1]" on page 9973 with "*Welsh*, 398 U.S. at 340.[2]" (prior footnote 1 becomes footnote 2) and insert the following immediately thereafter:

> While there can be no question that a "purely secular philosophical concern[ ]," *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981), is not encompassed by the free exercise clause, we conclude that the "generous functional (and even idiosyncratic) definition [of religion and religious beliefs in the] free exercise [context]," *Grove v. Mead School District*, 753 F.2d 1528, 1537 (9th Cir.) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985), includes Ward's system of principles.[3]
>
> To the extent that the free exercise clause does not protect "so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity," *Callahan*, 658 F.2d at 683 (internal quotation marks omitted), the focus of the judicial inquiry is not definitional, but rather devotional. *Id.* That is, is Ward sincere? Are his beliefs held with the strength of traditional religious convictions?

6. New footnote 3, to added text "includes Ward's system of principles":

> [3] Ward believes that the utilization of "a higher standard than truth" is, in his words, "a powerful, legitimate tool to protect society from dishonest and destructive people . . . ." This notion is quite like one

> of the *Seeger* examples—"others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." *Seeger*, 380 U.S. at 174.

7. Delete "While" (first word of first line, page 9974), and insert "but" following "one point uses the term 'atheistic')," in line three.

8. Replace "convictions" with "beliefs" in second sentence, page 9974.

9. Prior to last sentence (which begins "We conclude . . .") in line eight, page 9974, insert the following:

> Compelling him to testify under the "truth" oath would, he says, "profoundly violate" his "freedom of belief" and run counter to the "convictions that are the central theme of all his published books and writings for the past 22 years." This is the sincerity of true religious conviction.

10. Delete phrase "oath if he could also take his own" in first sentence of last partial paragraph, page 9976, and insert the following:

> "truth" oath, but only if he were permitted to also take his "fully integrated honesty" oath. In Ward's view, as best we can state it, only his oath expressed a commitment to the abstract purity of absolute "fully integrated honesty" that must be extracted from anyone before that person's word can be relied upon. The standard "truth" oath was so much surplusage—distasteful, wrong, but not necessarily a mortal sin to take.

11. Insert new footnote 4 following phrase "imposed upon him a higher duty," in line six of last partial paragraph, page 9976:

> 'We do not find compelling any contention that the beliefs of another individual of Ward's general convictions might be worthy of protection so long as that individual refused the "truth" oath altogether, while Ward's own particular creed, clearly less pure (as demonstrated by his grudging willingness to compromise), would not be protected. That argument is grounded in the notion that if Ward were truly and sincerely committed to fully integrated honesty, he would steadfastly refuse to have anything to do with the "truth" oath and would not consider for one moment uttering those hateful words. It is not within the court's " 'function or ... competence' " to inquire whether Ward or the zealot " 'more correctly perceived' " the particular religious wisdom in issue. *Callahan*, 658 F.2d at 686 (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)).

12. Insert new sentence at end of penultimate paragraph, page 9977:

> Ward's "attempt[ ] to express a moral or ethical sense of right and wrong," *Welsh*, 398 U.S. at 340, coupled with the de rigueur fervor, brings his beliefs squarely within those safeguarded by the free exercise clause.

No petition for rehearing will be entertained.

OPINION

FLETCHER, Circuit Judge:

Wallace Ward appeals his conviction of three counts of attempt to evade income tax in violation of 26 U.S.C. § 7201

and three counts of failure to file income taxes in violation of 26 U.S.C. § 7203. Ward argues that a new trial is necessary because the district court did not allow him to swear to an oath of his own creation, thereby precluding him from testifying in his own defense. We reverse and remand for a new trial.

BACKGROUND

Ward is the president of I&O Publishing Company, a mail-order house and publisher located in Boulder City, Nevada. The prosecution presented evidence at trial that despite having substantial income, neither I&O nor Ward filed tax returns or paid income taxes for the years 1983, 1984 and 1985.

On March 29, 1990 a grand jury indicted Ward on three counts each of tax evasion and failure to file income tax returns. Ward chose to represent himself at trial. On July 9, 1990, Ward filed a "Motion to Challenge the Oath," which proposed an alternative oath that replaced the word "truth" with the phrase "fully integrated Honesty." The oath would read, "Do you affirm to speak with fully integrated Honesty, only with fully integrated Honesty and nothing but fully integrated Honesty?" For reasons we will not attempt to explain, Ward believes that honesty is superior to truth. Magistrate Lawrence R. Leavitt ruled on August 2, 1990 that "the oath or affirmation which has been administered in courts of law throughout the United States to millions of witnesses for hundreds of years should not be required to give way to the defendant's idiosyncratic distinctions between truth and honesty." The district court overruled Ward's objections to the magistrate's order on August 28, 1990, and again on October 8, 1990. Ward pursued an interlocutory appeal on the issue, which was dismissed for lack of jurisdiction. *United States v. Ward*, No. 90-10534 (9th Cir. April 24, 1991).

A three-day trial commenced on February 11, 1991. Ward made a lengthy opening statement and actively cross-

examined government witnesses. At a sidebar during the second day of trial, Ward offered to take both the standard oath and his oath. The prosecutor was amenable to the compromise, but the district court refused to allow it. "This is an oath that has been used for a very long time," the district court said, "And I'm not going to establish a precedent where someone can come in and require the court to address that matter differently." At the close of the government's case on the third day of trial, Ward asked once again to testify under his oath. The judge again refused, saying "[T]he oath has been used for a very long time. . . . That's the oath that will be administered." Ward did not testify and presented no witnesses. The jury convicted Ward of all counts after an hour's deliberation.

Ward now appeals. He argues that the district court's insistence on an oath that violated his beliefs abridged his First Amendment right to free exercise of religion and his Fifth Amendment right to testify in his own defense.

DISCUSSION

Questions of trial management are ordinarily reviewed for abuse of discretion. *United States v. Goode*, 814 F.2d 1353, 1354 (9th Cir. 1987). However, this case turns on the defendant's First and Fifth Amendment rights. We review questions of constitutional law *de novo*. *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

[1] Judges may not determine the truth or falsity of matters of faith. Even so, we must determine as a threshhold matter whether Ward's beliefs are within the ambit of the First Amendment. In order for Ward to invoke "the protection of the Religion Clauses, [his] claims must be rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

But what is a religious belief? That is the question. In describing "the richness and variety of spiritual life in our

country," the Supreme Court has noted that some of the more than 250 sects in the United States "believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." *United States v. Seeger*, 380 U.S. 163, 174 (1965). "There are those," the Court continued, "who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss." *Id.* at 174-75. In short, the religious fabric of this country is one of a "vast panoply of beliefs." *Id.* at 175.

[2] In determining whether Ward's own peculiar notions[1] are protected as religious beliefs, "[the] task is to decide whether the beliefs professed ... are sincerely held and whether they are, in [Ward's] own scheme of things, religious." *Id.* at 185; *see also Welsh v. United States*, 398 U.S. 333, 339 (1970) (quoting same language in *Seeger*). "Religious" beliefs, then, are those that stem from a person's "moral, ethical, or religious beliefs about what is right and wrong" and are "held with the strength of traditional religious convictions." *Welsh*, 398 U.S. at 340.[2] While there can be no

[1]The peculiarity or uniqueness of Ward's creed is irrelevant; "[a] religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights." *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977), *cited in Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981).

[2]We recognize that the *Welsh* test was propounded by a four-justice plurality in the context of construing the statutory term "religious training and belief" as it appears in the conscientious objector exception to the Selective Service Act. However, Justice Harlan's concurrence adopted the plurality's test as a matter of constitutional interpretation. 398 U.S. at 345, 356-61 (Harlan, J., concurring). Courts regularly use the *Welsh* test to determine whether belief is "religious" for First Amendment free exercise purposes. *See Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1078 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Grove v.*

question that a "purely secular philosophical concern[ ]," *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981), is not encompassed by the free exercise clause, we conclude that the "generous functional (and even idiosyncratic) definition [of religion and religious beliefs in the] free exercise [context]," *Grove v. Mead School District*, 753 F.2d 1528, 1537 (9th Cir.) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985), includes Ward's system of principles.[3]

[3] To the extent that the free exercise clause does not protect "so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity," *Callahan*, 658 F.2d at 683 (internal quotation marks omitted), the focus of the judicial inquiry is not definitional, but rather devotional. *Id.* That is, is Ward sincere? Are his beliefs held with the strength of traditional religious convictions? Ward does not describe his beliefs in terms ordinarily used in discussions of theology or cosmology (although he at one point uses the term "atheistic"), but he clearly attempts to express a moral or ethical sense of right and wrong. Ward's actions are evidence of the strength of his beliefs. He strongly professes innocence of the crimes charged, yet he preferred to risk conviction and incarceration rather than abandon his version of the oath. Compelling him to testify under the "truth" oath would, he says, "profoundly violate" his "freedom of

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Mead School District, 753 F.2d 1528, 1537 (9th Cir.) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985); *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2nd Cir. 1981); *See also Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1031-32 (3rd Cir. 1981) (refinement of *Welsh* test), *cert. denied*, 456 U.S. 908 (1982).

[3]Ward believes that the utilization of "a higher standard than truth" is, in his words, "a powerful, legitimate tool to protect society from dishonest and destructive people . . . ." This notion is quite like one of the *Seeger* examples—"others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." *Seeger*, 380 U.S. at 174.

belief" and run counter to the "convictions that are the central theme of all his published books and writings for the past 22 years." This is the sincerity of true religious conviction. We conclude that Ward professes beliefs that are protected by the First Amendment.

[4] The court's interest in administering its precise form of oath must yield to Ward's First Amendment rights. To begin with, there is no constitutionally or statutorily required form of oath. Federal Rule of Evidence 603 requires only that a witness "declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." The advisory committee notes to Rule 603 explain that "the rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required." This rule represents no break with the common law, which recognized that

> the oath's efficacy may depend upon both the general name and nature of the witness' faith and the formula of words or ceremonies which he considers as binding, i.e., as subjecting him to the risk of punishment. But it cannot matter what tenets of theological belief or what ecclesiastical organization he adheres to, provided the above essentials are fulfilled, and it *cannot matter what words or ceremonies are used* in imposing the oath, provided he recognizes them as binding by his belief.

6 Wigmore, Evidence § 1818 (Chadbourne rev. 1976) (original emphasis).

[5] Our cases have routinely held that it is reversible error for a district court to prevent a party from testifying solely on the basis of the party's religiously-based objections to the

form of the oath. In *Gordon v. State of Idaho*, 778 F.2d 1397 (9th Cir. 1985), a plaintiff in a § 1983 action professed religious objections to oath or affirmation, offering instead to say "I understand that I must tell the truth. I agree to testify under penalty of perjury." Using First Amendment analysis requiring that government use the "least restrictive means" to its ends when free exercise is at stake, we held that it was an abuse of discretion for the district court to insist upon the standard oath and to dismiss plaintiff's case for failure to present evidence. *See also Ferguson v. C.I.R.*, 921 F.2d 588 (5th Cir. 1991) (tax court proceeding, similar facts). Criminal trials additionally implicate the defendant's Fifth Amendment right to testify.

> All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth. Thus, defendant's privilege to testify may not be denied him solely because he would not accede to a form of oath or affirmation not required by the common law. . . . [A]ll the district judge need do is to make inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs but would give rise to a duty to speak the truth.

United States v. Looper, 419 F.2d 1405, 1407 (4th Cir. 1969). *See also Moore v. United States*, 348 U.S. 966 (1955) (per curiam) (criminal defendant with religious objections to the word "solemnly" in the oath must be allowed to testify).

[6] Neither the magistrate nor the district court cited to any of these authorities, relying instead on their perception that the standard oath had not changed "for hundreds of years." While oaths including the familiar "truth, whole truth, and nothing but the truth" formulation date back at least to the seventeenth century, *see* 6 Wigmore, Evidence § 1818(2) (Chadbourne rev. 1976), the principle that the form of the oath must be crafted in a way that is meaningful to the witness

also predates our constitution. In *Omichund v. Barker*, 1 Atk. 22, 45 (1744), Lord Chief Judge Willes wrote, "It would be absurd for [a non-Christian witness] to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath." *See also Atcheson v. Everitt*, 1 Cowp. 382, 389 (1776) (Mansfield, L.C.J.) ("[A]s the purpose of [the oath] is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most").

[7] This case has an odd twist in that the defendant offered to take the traditional "truth" oath, but only if he were permitted to also take his "fully integrated honesty" oath. In Ward's view, as best we can state it, only his oath expressed a commitment to the abstract purity of absolute "fully integrated honesty" that must be extracted from anyone before that person's word can be relied upon. The standard "truth" oath was so much surplusage—distasteful, wrong, but not necessarily a mortal sin to take.

His own oath superimposed on the traditional one would have taken nothing away from the commitment to tell the truth under penalties of perjury and, indeed, in the defendant's mind imposed upon him a higher duty.[4] Under these circumstances the district court clearly abused its discretion in refus-

[4]We do not find compelling any contention that the beliefs of another individual of Ward's general convictions might be worthy of protection so long as that individual refused the "truth" oath altogether, while Ward's own particular creed, clearly less pure (as demonstrated by his grudging willingness to compromise), would not be protected. That argument is grounded in the notion that if Ward were truly and sincerely committed to fully integrated honesty, he would steadfastly refuse to have anything to do with the "truth" oath and would not consider for one moment uttering those hateful words. It is not within the court's " 'function or . . . competence' " to inquire whether Ward or the zealot " 'more correctly perceived' " the particular religious wisdom in issue. *Callahan*, 658 F.2d at 686 (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)).

ing the oath and preventing the defendant's testimony. We do not have a case where the witness offers to swear only to a cleverly worded oath that creates loopholes for falsehood or attempts to create a safe harbor for perjury as in *United States v. Fowler*, 605 F.2d 181, 185 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980), where the court properly refused testimony from a defendant who would not say so much as "I state that I will tell the truth in my testimony," and was willing to say only "I am a truthful man" or "I would not tell a lie to stay out of jail." Ward's "attempt[ ] to express a moral or ethical sense of right and wrong," *Welsh*, 398 U.S. at 340, coupled with the de rigueur fervor, brings his beliefs squarely within those safeguarded by the free exercise clause.

[8] Ward also seeks to vindicate what he perceives to be his right to have all his witnesses sworn to his oath. This he cannot do. Ward has no standing to assert the First or Fifth Amendment rights of others. *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1081 (9th Cir. 1987). Ward also alleges numerous trial errors which we need not consider in light of our grant of a new trial.

REVERSED and REMANDED.

POOLE, Circuit Judge, dissenting:

The majority seizes upon the defendant's semantic objection to the word "truth" and concomitant preference for the term "honesty" to reverse a conviction, but this result is not commanded by the Free Exercise Clause and runs afoul of the rule that any oath taken must convince the court that a witness is committed to truthful testimony and is aware of the cost of dishonesty on the stand. I would hold that the district court did not abuse its discretion in failing to provide a customized oath for Ward.

It is axiomatic that even the most sincere of beliefs is not entitled to the protection of the Free Exercise clause unless it is rooted in religion. *See, e.g., Thomas v. Review Board,* 450 U.S. 707, 713 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972). We do not require a belief in God, but we do require a belief to "occup[y] a place in the life of its possessor parallel to that filled by the orthodox belief in God." *Mason v. General Brown Central School Dist.,* 851 F.2d 47, 51 (2d Cir. 1988). A "purely secular philosophical concern" is not enough to override the state's interest in uniform regulation. *Callahan v. Woods,* 658 F.2d 679, 683 (9th Cir. 1981); *see also Johnson v. Moore,* 948 F.2d 517, 520 (9th Cir. 1991).

I believe that Ward's objection to the oath ordinarily required of witnesses by Fed. R. Evid. 603 amounts to nothing more than a philosophical predilection. Ward does not tell us how his concerns about the misuse of the word "truth" affects his ability to cope with the pressures and challenges of his daily life. He does not enlighten us as to how habitual application of the term "honesty" provides him spiritual growth, relates to his understanding of life's purpose and meaning, or guides his daily routine. He does tell us that "honesty" means that all of the world's problems will disappear because then we will all know people are not lying, but I fail to see how this prediction satisfies the requirement that Ward's preference for a particular word be as important, or even as relevant, as religion is in the lives of many people.

Even were I to give Ward the benefit of the doubt and ascribe religious significance to his "ultimate concern" with the merits of the word "honesty," I would still decline to require the district court to accommodate his objection. The district court must modify the oath to reflect genuinely held objections to it, but the court must also satisfy itself that the witness has committed himself to speak the truth. It is not enough that the witness says he knows of his obligation to do so; there must be a promise based on the awareness that failure to be honest is punishable under our law. *See United*

States v. Looper, 419 F.2d 1405, 1407 (4th Cir. 1969); *Wilcoxon v. United States*, 231 F.2d 384, 387 (10th Cir. 1956), *cert. denied*, 351 U.S. 943 (1957); *Gordon v. State of Idaho*, 778 F.2d 1397, 1401 n.2 (9th Cir. 1985) (Weigel, J., dissenting). Ward's proposed alternative oath does not contain an acknowledgment of the *duty* to speak truthfully and does not ensure that the defendant is aware of the cost of dishonesty.

The majority's accommodation of Ward's "purely secular philosophical concerns," *Callahan*, 658 F.2d at 683, will result not in protection of a valuable Constitutional right but in numerous wasteful and time-consuming attacks on the oath mandated as a means of guaranteeing truth and of expediting the administration of justice. I dissent.